In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1179

ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Petitioners,

vs.

GILBERT STAMM, et al.,
Respondents.

Brief of Respondent-Intervenor Associated General Contractors of California, Inc. in Opposition to Petition for Writ of Certiorari

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This brief is filed on behalf of Associated General Contractors of California, Inc., which intervened during the proceedings before the District Court for and on behalf of its members, firms which are engaged in the heavy construction business throughout the State of California. This respondent-intervenor was also a responding party defendant on appeal to the United States Court of Appeals for the Ninth Circuit. For purposes of convenience, this respondent-intervenor is hereinafter referred to as "AGC".

QUESTIONS PRESENTED

1. Does the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-47, require a discussion of the need for the project within the environmental impact statement ("EIS") itself, or is that issue within the exclusive province of the authorized decision makers?

2. Is the correct standard which governs judicial review of the adequacy of an EIS that set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)?

3. Does the State Water Resources Control Board Decision 1422 require respondents to file a supplemental EIS, or have all interested parties been adequately advised of that decision?

STATEMENT OF THE CASE

AGC adopts in full the Statement of the Case as set forth in the brief filed with this Court by the local area respondent-intervenors, including the County of Calaveras, et al., the State Building and Construction Trades Council of California and California State Conference of Operating Engineers.

ARGUMENT

I. An EIS Need Not Discuss the Need for a Proposed Project, Nor Is There a Conflict Among the Lower Federal Courts on This Point.

Although petitioners attempt to give some credibility to their argument that the EIS should have evaluated the need for irrigation by clothing that argument in the language of the National Environmental Policy Act, when all the trappings are stripped away the issue is clear. The question is whether a federal agency is required by NEPA to discuss the need for the project within the EIS itself, or whether

the need for the project is a subject within the exclusive province of the authorized decision maker, i.e., Congress.

Petitioners cite cases which they argue support the proposition that an EIS must discuss the need for a project. Even a cursory reading of the cases cited by petitioners reveals that they stand for no such proposition. Thus, petitioners cite the Eighth Circuit case of *EDF v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972), which states that "the complete impact study must contain more than a catalog of environmental facts . . . the complete formal impact study represents an *accessible* means for opening up the agency decision making process and subjecting it to critical evaluation by those outside the agency, including the public." Petitioners also cite *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973), for the proposition that an EIS must also "explore and evaluate alternatives in such a way as to permit them to be sensibly compared". (Petition for Writ of Certiorari, p. 18). Further, petitioners cite the guidelines of the Council on Environmental Quality and the legislative history of NEPA for the proposition that alternative actions must be adequately evaluated.

AGC cannot and does not disagree with the propositions set forth in the cited cases, the guidelines, and the legislative history. An EIS should contain "more than a catalog of environmental facts" and should "explore and evaluate alternatives in such a way as to permit them to be sensibly compared". However, this is *not* the same thing as saying that the EIS itself must justify the *need* for the project.

Such a discussion of the need for a project would be presumptuous and directly inapposite to the purposes of NEPA. An opinion as to the need for a propect by such an agency would necessarily mean that the agency would have to make an initial determination of whether or not certain

results are desirable, before it could determine whether or not the project was needed. For instance, increases in population and industrial growth may or may not be desirable results. If the agency decided such results were desirable, the project would be needed. If the agency decided such growth was not desirable, the project would be unneeded. Such an initial determination is obviously beyond the realm of the agency and must be left to the authorized decision maker, i.e., Congress.

A careful reading of the cases in the various Circuits reveals that no lower federal court has held that an EIS must discuss the need for a project. There is, therefore, no conflict among the Circuits on this point as contended by petitioners. Petitioners attempt to argue that such a conflict exists between the Ninth Circuit and the other Circuits by mischaracterizing the holdings in the Ninth Circuit. Thus, petitioners state that the Ninth Circuit "appears to stand alone in taking the view that an EIS which is no more than a catalogue of environmental data is sufficient and that it need not also set forth data of other kinds to permit intelligent reexamination of the agency's decision to proceed". (Petition for Writ of Certiorari, p. 20).

Of course there has been no such holding in any decision by the United States Court of Appeals for the Ninth Circuit. In the instant case the Court of Appeals appears not to have even reached the question, since it recognized the dispute as one over the evaluation of the evidence for the need and said that as to the project's need itself there "was no real conflict". *EDF v. Armstrong*, 487 F.2d 814, 817 (9th Cir. 1973). Even assuming that it did reach the question whether an EIS must discuss the need for a project, there is no such holding as petitioners suggest.

The decision in the Ninth Circuit which most thoroughly discusses the necessary contents of an EIS is *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (9th Cir. 1973), an action brought for judgment declaring that the Secretary of the Interior had failed to comply with NEPA procedures in connection with construction of electric generating facilities. In discussing the role of an appellate court in an environmental impact case, the court said (471 F.2d at 1279-80, emphasis added):

> *At the outset we note that this Court may not substitute its judgment for that of the Secretary of the Interior as to the necessity or desirability of the projects in question.* We are not asked to determine whether present and future power needs of the Southwestern United States should be met by coal-fired energy production nor are we asked to distinguish between power requirements and power demands. *This Court is not to balance the benefits of the development of additional electric power against its adverse effect on the environment. Instead, our scope of review is very narrow. We are limited to the question whether the Secretary's action followed the necessary procedural requirements.*

The Court of Appeals followed *Jicarilla* in its opinion in the instant case when it said (*EDF v. Armstrong*, 487 F.2d 814, 822 n. 13 (9th Cir. 1973):

> We do not read the National Environmental Protection Act to give to the courts the ultimate authority to approve or disapprove construction of a properly authorized project where an adequate EIS has been prepared in accordance with the NEPA requirements . . . We have taken the view that final judgments of project justification are not subject to review in an action to consider the adequacy of an EIS statement under NEPA. [citing *Jicarilla*]. Congress in reauthorizing the project and in determining whether to pro-

ceed in the light of the EIS must consider many other factors in addition to the environmental effects. Those questions are not before us and properly so.

The Ninth Circuit has simply said, and correctly so, that an EIS should be limited to a review of environmental factors and that the ultimate determination of the need for the project should be left to the decision makers. This view is in no way contrary to the view of the other Circuits.

II. There Is No Merit in the Contention That the Court of Appeals Did Not Apply the Appropriate Judicial Standard of Review, Nor Is There a Conflict Among the Lower Federal Courts on This Point.

Petitioners argue that there is a conflict among the lower federal courts as to the correct standard which governs judicial review of the adequacy of environmental impact statements. In an attempt to persuade this Court to grant the petition, petitioners again attempt to create a conflict where no such conflict exists.

For some unexplained reason petitioners devote almost a full page to the discussion of a decision where this Court held that under the Administrative Procedure Act ("APA") the Secretary of Transportation's decision to approve a highway in the exercise of his discretion under the Department of Transportation Act, 49 U.S.C. § 1653(f), was judicially reviewable. Petitioners admit that this case did not arise under NEPA and, therefore, AGC is at a loss to determine its relevancy to the instant case. In any event, the decision adds nothing to petitioners' argument.

Petitioners concede that the "touchstone for judicial review of administrative action [is the Administrative Procedure Act."] (Petition for Writ of Certiorari, p. 22). However, they apparently attempt to argue that a conflict exists

among the lower federal courts because some lower courts have put a "gloss" upon the "bare-boned standards in the APA" which stands in "stark contrast" to the standard of review which the Ninth Circuit has adopted. Not only does AGC fail to see the "stark contrast" between the standard of review adopted by the Ninth Circuit and that adopted by other lower federal courts, AGC fails to recognize that the other lower federal courts have even placed such a "gloss" on the APA standard of review.

Petitioners cite and quote from *Silva v. Lynn*, 482 F.2d 1282, 1284 n. 2 (1st Cir. 1973), in support of their position that such a gloss has been placed on the APA standard of review by the other lower courts. That case and the quotation stand for no such proposition. That quotation relates to a footnote in the case where the court emphasized the word "detailed" as it is used in NEPA requiring a detailed environmental impact statement. (42 U.S.C. § 4332(2)(C)). All the court was saying in dictum is that the EIS must be a "detailed" statement, which connotes a careful, reasoned and fully explained analysis. There is nothing incongruous in requiring a detailed environmental impact statement and then reviewing that detailed statement to determine whether the agency acted arbitrarily or capriciously in its presentation of those details.

Petitioners also cite the case of *EDF v. TVA*, 468 F.2d 1164, 1174-75 (6th Cir. 1972), for the proposition that the Sixth Circuit has placed a gloss upon the APA standard of review not followed by the Ninth Circuit. Again, this is not the case, since the citations to *EDF v. TVA* stand merely for the proposition that agencies are to comply "to the fullest extent possible" with the requirement that a "detailed" statement be provided. Again, there is nothing incongruous in requiring an agency to comply "to the fullest

extent possible" with the requirements that a "detailed" statement be provided, and then applying the "arbitrary and capricious" standard to determine whether that agency has, to the fullest extent possible, complied with the requirement that such a detailed statement be provided.

The appellate courts in several Circuits besides the Ninth Circuit have applied the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), in reviewing the adequacy of environmental impact statements. *Silva v. Lynn*, 482 F.2d 1282, 1283-84 n. 1 (1st Cir. 1973); *EDF v. Corps of Engineers*, 470 F.2d 289, 298 n. 14 (8th Cir. 1972). Thus, no conflict exists among the lower federal courts on the correct standard which governs judicial review of the adequacy of an EIS. Further, the Court of Appeals for the Ninth Circuit correctly applied that standard in the instant case.

III. There Is No Merit in the Contention That the State Water Resources Control Board Decision Requires the Filing of a Supplemental EIS.

Petitioners contend that Decision 1422 of the California State Water Resources Control Board was a new development so significant as to require respondents to file a supplemental EIS before they committed themselves further to the project as presently designed.

AGC contends that Decision 1422 cannot and should not serve as a basis for granting a Writ of Certiorari for the following three reasons, among others:

(1) In the first place, inherent in Decision 1422 is precisely the same issue involved in litigation presently pending in the District Court for the Eastern District of California (see p. 25, n. 14 of Petition for Writ of Certiorari). That issue is the conflict between federal and state authorities

over who has the ultimate power with respect to a diversion of the state's water by federally authorized and funded projects. As the AGC understands the situation, it is the position of the Board that the federal government is the same as every other diverter or user of water and is subject to state authority and must comply with stated conditions in connection with water permits. We understand the federal position to be that no state government or agency may impose any restrictions or conditions upon the agencies of the federal government in connection with congressionally authorized projects. (*EDF v. Armstrong,* 487 F.2d 814, 818 n. 8 (9th Cir. 1973).

Presumably, the District Court of the Eastern District of California will, in due course, issue a decision bearing directly on this intricate federal-state relationship issue. However, and acting on the assumption that the Bureau of Reclamation will not accept the conditions of Decision 1422, for this Court to require the filing of a supplemental EIS because of that decision implies a finding in favor of the state authority as against the federal authority on this important but complex question—a question which has never been briefed or argued in this case in any way, manner, shape, or form.

(2) Petitioners argue that respondents have "put all their eggs in one basket", implying that unless the federal courts uphold their suit challenging the jurisdiction of the Board over the United States, the project must necessarily fail. Such is not the case. The Board specifically recognized that "there is a demonstrated need for the full yield of the project" at some time in the future and stated that the Board "should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when

the need for the water is substantiated." (Decision 1422, p. 27, *Appendix F* to Petition for Writ of Certiorari). The Board clearly envisioned a time in the future when the Bureau of Reclamation would present evidence of a specific plan to use the conservation yield for designated consumptive uses. As that evidence is presented and the specific need for the water is substantiated, the Board would then issue permits approving incremental appropriations for consumptive use up to the full quantity covered by the original applications of the Bureau.

(3) Petitioners criticize the Court of Appeals for failing to give consideration to the three questions raised by the CEQ letter of April 17, 1973. Petitioners imply that the Court of Appeals indicated that it would give "careful consideration" to those questions and then did not do so. Of course, the question which the Court of Appeals set out to consider and did consider was not a response to that letter but rather a response to the CEQ suggestion that a supplemental EIS be prepared and circulated. The Court of Appeals amply considered that suggestion and came to the conclusion that no supplemental EIS was necessary.

As indicated by the Court of Appeals, the purposes of NEPA have been satisfied without the necessity of a supplemental EIS discussing the effects, if any, of Decision 1422. The Court of Appeals noted that the decision makers, the Corps of Engineers, and the Bureau of Reclamation are "fully aware of the order, its effect and its implications." (*EDF v. Armstrong*, 487 F.2d 814, 821 (9th Cir. 1973). Further, that court noted that the Chairman of the CEQ, the author of the April 17 letter referred to by petitioners, has the decision. All interested parties, including most importantly the pertinent decision makers, can, therefore,

consider its implications without the necessity of a supplemental EIS being prepared simply to discuss it.

CONCLUSION

For these reasons AGC respectfully urges that the Petition for Writ of Certiorari in this proceeding should be denied.

Respectfully submitted,

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